

ABRAHAM RODRIGUEZ

V.

Respondent

Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

The ALJ concluded the Fund has the burden to show respondent has the financial ability to pay benefits to claimant and, based on the evidence, it has not met that burden.

Therefore, the Fund was ordered to pay temporary total disability compensation (TTD) from November 2, 2015, until claimant is released to return to work, has been offered accommodated work within his restrictions, or has reached maximum medical improvement (MMI). The ALJ found respondent remained obligated to pay \$900.00 in penalties assessed on March 16, 2016.

The Workers Compensation Fund appeals, arguing the ALJ has erred by ordering it to pay compensation to claimant when respondent has not been properly vetted to show it is unable to pay compensation on its own.

Claimant did not file a brief, but would presumably argue the ALJ's Order should be affirmed.

Respondent did not file a brief.

FINDINGS OF FACT

The Fund was implead because respondent is not participating in or following the orders of the ALJ. Claimant's counsel does not believe solvency has to be shown and points out there has been an inability or refusal by respondent to pay ordered compensation since November 2015. This record contains no information from respondent regarding its ability or inability to pay compensation, and no subpoenas were issued for depositions to investigate.

Claimant testified he was paid \$120 a day with payday being every Friday. He was one of six employees and he believed the others were paid more than him. Claimant did not notice respondent having any trouble making payroll. It is claimant's belief that Scott Bishop, the owner of respondent, owned the building the company is housed in and the equipment used.

An Order was issued by the ALJ on January 8, 2016, ordering respondent to pay TTD to claimant commencing November 2, 2015, and continuing until claimant reaches MMI. Another Order was issued by the ALJ on March 16, 2016, ordering respondent to pay penalties in the amount of \$900.00, for its failure to pay the earlier ordered TTD. To date, respondent has paid claimant nothing.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2015 Supp. 44-532a(a) states:

- (a) If an employer has no insurance or has an insufficient self-insurance bond or letter of credit to secure the payment of compensation, as provided in subsection (b)(1) and (2) of K.S.A. 44-532, and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the

workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569, and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

This record verifies respondent has no workers compensation insurance, bond or letter of credit to support its obligations to follow the law in Kansas. Once the dispute regarding claimant's status as an employee rather than an independent contractor was established, respondent's obligation under the Workers Compensation Act (Act) became clear. Claimant is entitled to medical benefits sufficient to cure and relieve him of the effects of this work-related injury, and financial compensation as allowed by statute.

Respondent was ordered to pay TTD beginning November 2, 2015, and continuing until released at MMI and \$900.00 in penalties for its refusal to pay that same ordered TTD. The claimant has been without income since the injury in November 2015.

The Fund argues no evidence of respondent's financial status or ability to pay has been placed into this record. The Fund appears to place this burden on claimant. However, the appellate courts have ruled otherwise.

The Kansas Supreme Court, in *Silicone*¹ determined that a claimant need only elect to assert a compensation claim against either the immediate or the statutory employer, in order to involve the Fund. *Silicone* involved a situation where the claimant's employer, *Silicone* had contracted with a separate company to perform a portion of cleaning and repairing buildings where the separate company was under contract to perform the work and *Silicone* was a sub-contractor. The claimant filed a claim against *Silicone* but not the separate company. Attempts to include *Silicone* in the legal proceedings were unsuccessful.

The Fund's argument, in *Silicone*, that the claimant could only pursue it after the injured worker had made a claim against the separate company was rejected and the Court of Appeals determined the claimant was not required to exhaust her remedies against both the subcontractor and the principal before asserting a claim against the Fund. The Court determined this would be contrary to the policy and purpose of the Act.

¹ *Workers Compensation Fund v. Silicone Distributing, Inc.*, 248 Kan. 551, 809 P.2d 1199 (1991).

The Court of Appeals, in *Helms*,² after analyzing *Silicone*, determined no cited cases had been found requiring the claimant to prove the employer to be unable to pay benefits. The Court determined *Silicone* supports a position that the claimant does not bear that burden.

The Court of Appeals, in *Olds-Carter*³ noted the right of the Fund to sue an employer under K.S.A. 44-532a(b) after satisfying a claim of an employee. The Insurance Commissioner steps into the shoes of the employee and is subrogated to the rights of the employee. The Court noted the policy and purpose behind the Act is to furnish a remedy which is both expeditious and free from proof of fault.

This Board Member acknowledges the above cases involved preliminary determinations of an employer's inability to pay. Whereas, in this instance claimant has provided no financial information, nor attempted to subpoena any respondent representative to determine its financial status. However, this respondent has been ordered to pay substantial TTD and penalties, and, to date, has failed and refused to pay anything. This claimant has been without compensation since November 2015. Additionally, the Fund only need to pursue respondent in order to recoup any TTD payments made on this claimant's behalf.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. The claimant's request that the Fund pay benefits to claimant is granted. The Fund's right to pursue this respondent for reimbursement remains. The Fund has no obligation regarding the \$900.00 in penalties ordered by the ALJ against respondent.

² *Helms v. Pendergast*, 21 Kan. App. 2d 303, 313, 899 P.2d 501 (1995).

³ *Olds-Carter v. Lakeshore Farms, Inc.*, 45 Kan. App. 2d 391, 250 P.3d 825 (2011).

⁴ K.S.A. 2014 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Gary K. Jones dated May 13, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Gary K. Jones, Administrative Law Judge